Joo Han Shipping Pte Ltd v Ting Brothers Sdn Bhd

HIGH COURT (KUCHING) — CIVIL REVISION NO 13-18-99-III(II)
IAN CHIN J
18 APRIL 2000

Shipping and Navigation *— Carriage of goods — Liability of carrier — Damage occurred before delivery — Whether discharge at port synonymous with delivery — Whether possibility of damage having occurred while machine was in custody of port authority relevant*

The respondent had claimed for damages for damage to a machine that was shipped on a vessel of the appellant carrier. When the machine was discharged from the vessel, the port authority immediately noted damage to the case containing the machine. The machine was later surveyed by the respondent when they wanted to take delivery and the damage to the machine was noted. The lower court entered judgment in favour of the respondent. The appellant appealed. The appeal turned on the question of when the machine was damaged and whether the discharge of the machine at the port amounted to delivery of the machine.

Held, dismissing the appeal:

The damage occurred while the machine was still on board the vessel. The machine could only be regarded as having been delivered to the respondent when the respondent took delivery of the machine and not when the machine was discharged from the vessel. Therefore, even assuming that the machine was damaged while still in the custody of the port authority, the appellant would still be liable as the damage occurred before the machine was delivered to the respondent (see p xxxxx); *American Hoesch Inc and Riblet Products Inc v Steamship 'AUBADE' etc and Maritime Commercial Corp Inc* [1971] Lloyd's LR 423 followed (see pp 689I–690D).

[Bahasa Malaysia summary

Respondent menuntut ganti rugi untuk kerosakan sebuah mesin yang diletakkan dalam kapal perayu. Semasa mesin tersebut dikeluarkan daripada kapal, pihak berkuasa pelabuhan dengan serta merta mencatitkan kerosakan yang terdapat pada bungkusan mesin tersebut. Mesin tersebut kemudiannya telah diteliti oleh responden semasa mereka menghendaki penghantaran dan kerosakan tersebut telah diambilkira. Mahkamah bawahan memasuki penghakiam yang menyebelahi responden. Perayu telah membuat rayuan. Rayuan tersebut berkisarkan persolan bila mesin tersebut rosak dan sama ada pelepasan mesin di pelabuhan tersebut membentuk penghantaran mesin tersebut.]

Diputuskan, menolak rayuan tersebut:
Kerosakan berlaku semasa mesin tersebut masih berada di atas kapal. Mesin tersebut hanya boleh dianggap telah dihantarkan kepada responden semasa responden mengambil penghantaran mesin tersebut dan bukan semasa mesin tersebut dikeluarkan daripada kapal. Oleh itu, walaupun dengan anggapan bahawa mesin tersebut telah rosak semasa masih dalam kawalan pihak berkuasa pelabuhan, perayu masih bertanggungjawab kerana kerosakan tersebut berlaku sebelum mesin tersebut dihantarkan kepada responden (lihat ms 689I–690D)); *American Hoesch Inc and Riblet Products Inc v Steamship 'AUBADE' etc and Maritime Commercial Corp Inc* [1971] Lloyd's LR 423 diikut.]

Notes

For cases on carriage of goods generally, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1013–1209.

Cases referred to

American Hoesch Inc and Riblet Products Inc v Steamship 'AUBADE' etc and Maritime Commercial Corp Inc [1971] Lloyd's LR 423 (refd)

Bexter Michael (*Ee & Lim*) for the appellant.
Francis Teron Kadap (*Kho & Poh*) for the respondent.

Ian Chin J:

Introduction

This matter together with about 45 others ('about' because there is confusion regarding the number of cases involved) had languished for far too long in one of the sessions courts so much so that I, being responsible for the supervision of the lower courts in Kuching, Sri Aman, Labuk Antu and Serian, had to exercise my power of supervision to call for the records. The parties have waited since 14 March 1995 for the grounds of decision which were only ready sometime in December 1999 and that was after I had called for the file. Judgment was given on 1 March 1995 for Ting Brothers Enterprise Sdn Bhd ('the respondent') against Joo Han Shipping Pte Ltd ('the appellant') for RM53,730.73, interest and costs for damages to a machine that was shipped on a vessel of the appellant carrier.

Facts of case

The machine, packed in a case, was loaded in Germany and discharged in Singapore for transhipment to Kuching which later journey involved the appellant as the carrier. It is common ground that the shipment is governed by the bill of lading. The machine was unloaded on 21 November 1989 and stored in the transit shed of the Kuching Port Authority ('the KPA'). The KPA had on that day surveyed the cargo and noted this: 'Case with planks

broken/content exposed'. On 29 November the machine was surveyed when the plaintiff wanted to take delivery and the damage to the machine was reported in these words:

> The base of the wooden crate was seen dislodged with some planks noted broken. However, the machine was still secured to the base but had toppled. One side of the wooden crate was severely broken. The metal straps securing the crate also broke off thus causing the entire crate to be disaligned. Following the survey on the outward appearance only by the Port Authority, we requested the insured to dismantle the wooden crate to determine the extent of the damage to the machine. On dismantling the crate, we noted that some of the carton boxes containing the accessories were torn. We then identified all the accessories and discovered that the following items were missing:
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> (i) extra charge for distance between centres 1800 mm, copying/cutting length 1250;
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> (ii) inset ring (cast iron) f dto Dia 30mm;
>
> (iii) pneumatic inlaying fork for workpieces with quick gripping device for tailstock; and
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> (iv) clamping device for curved workpieces.
>
> In addition to the missing accessories, we noted that the entire machine was damped with rust eminent on the Control Desk and some other body panels. The 3KW motor's terminal & housing and the coil assy and plug in the sperry vickers hydraulic valve were found cracked. Severe rust and corrosion were seen on the hydraulic tank with a socket head broken. The centre hydraulic cylinder was bent/disaligned whilst the wound milling's gears were found heavily rusted.

Grounds of appeal

It was initially argued that the respondent was not privy to the contract and therefore cannot sue. This contention was abandoned but it was then attempted to argue it differently, that is that the appellant was not the same entity named in the bill of lading. The bill of lading at one place states the carrier to be Joo Han Shipping Sdn Bhd instead of Joo Han Shipping Pte Ltd. But, as this was not raised in the lower court nor pleaded, I did not allow the matter to be further argued.

The next ground of appeal turns on (i) the question when the machine was damaged and (ii) the question of whether the discharge of the machine at the Kuching port amounted to a delivery of the machine. It will be recalled that when the machine was discharged from the vessel on 21 November, the KPA immediately noted the damage to the casing that contained the machine. The machine in its casing was acknowledged in the bill of lading to have been received by the vessel 'in apparent good order and condition'. That being the situation, it is beyond argument that the damage occurred while the machine was still on board the vessel. This question was raised because it was contended that since no notice of damage was given by the respondent — as required by the following provision in the bill of lading:

> Unless notice of loss of or damage in the goods and the general nature of it be given in writing to the carrier at the place of delivery before or at the time of removal of the goods into the custody of the person entitled to delivery thereof under the bill of lading, or if the loss be not apparent, within six consecutive days thereafter, such removal shall be prima facie evidence of the delivery by the carrier of the goods described in this bill of lading.

the respondent had to prove that the damage had occurred which resulted in prima facie proof of good condition which can be rebutted by evidence as had been done, as mentioned earlier, by evidence of the fact that the casing was already damaged when the machine was unloaded (see *William Tetley on Marine Cargo Claims* (3rd Ed) at p 29).

For the same reason that the machine was damaged at the time it was delivered, it matters not that the discharge of the machine on 21 November was equivalent to delivery of the machine to the respondent since it was already damaged before its delivery to the respondent. However, 'discharge' cannot be synonymous with 'delivery'. For this purpose, I need only rely on *American Hoesch Inc and Riblet Products Inc v Steamship 'AUBADE' etc and Maritime Commercial Corp Inc* [1971] Lloyd's LR 423 to conclude that the machine can only be regarded as having been delivered to the respondent when the respondent took delivery of the machine on 29 November and not when the machine was discharged from the vessel on 21 November. Therefore, even assuming that the machine was damaged whilst in the custody of the KPA, the appellant would still be liable as the damage occurred before the machine was delivered to the respondent.

Conclusion

In the premises, the appeal is dismissed with costs to the respondent.

Appeal dismissed.

Reported by Andrew Christopher Simon